No. 1182

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT E. DINEEN, Superintendent of Insurance of the State of New York, as Liquidator of Lawyers Mortgage Company,
Petitioner,

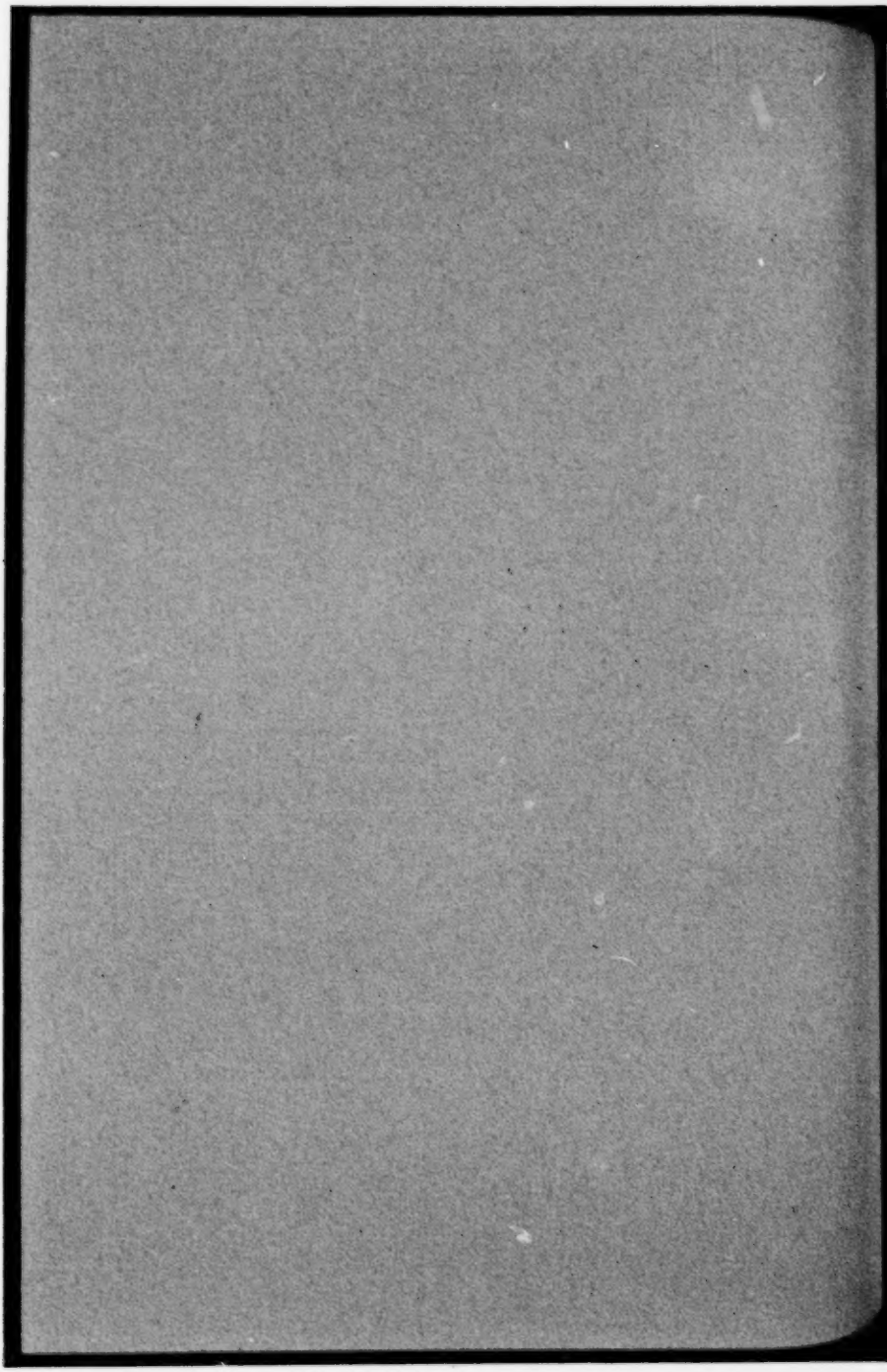
v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

SAMUEL MARKOWITZ,
Counsel for Petitioner.

THOMAS D. AUSTIN,
ALFRED C. BENNETT,
Of Counsel.



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THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

Petition

Samuel Markowitz, counsel, on behalf of the petitioner, Robert E. Dineen, Superintendent of Insurance of the State of New York, as Liquidator of Lawyers Mortgage Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on February 6, 1946 (R. 179), affirming the judgment of the United States District Court for the Southern District of New York (R. 169-170).

Question Presented

Whether Lawyers Mortgage Company, a corporation organized under the insurance law of the State of New York, engaged in the business of making real estate mortgage loans, selling such mortgages with its policy or certificate of mortgage guarantee and receiving premiums for such guarantee, was an insurance company for the year 1931, subject to the tax imposed by Section 204 of the Revenue Act of 1928, and therefore not taxable under that Section on its income from fees and charges for services rendered in connection with the making or extending of mortgage loans.

Statute Involved

Section 204 of the Revenue Act of 1928, c. 852, 45 Stat. 791—set out in the Appendix, pp. 15-17, infra.

Statement

Lawyers Mortgage Company, hereinafter referred to as the Company, a New York insurance corporation, paid an income tax for the year 1931 as an ordinary business corporation (R. 127). Subsequently, the Company was taken over for rehabilitation by the Superintendent of Insurance of the State of New York, and he, as Rehabilitator of the Company, filed a claim for refund of part of the tax paid, on the ground that the Company was an "insurance company other than life or mutual", subject to tax under Section 204 of the Revenue Act of 1928, and, therefore, not taxable on its income from sources other than those specified in that section (Exhibit A-5, R. 131, 142). The claim for refund not having been allowed nor rejected by the Commissioner of Internal Revenue, suit for refund was thereafter brought in the United States District Court for the Southern District of New York (R. 1). The cause was

tried without a jury, upon an agreed statement of facts (Exhibit A, R. 121-130) and upon oral testimony. The District Court directed judgment for the defendant (R. 168).

The Company was organized under the insurance law of the State of New York, on or about February 9, 1893 (R. 123). Its charter was twice amended, the last time in 1913, authorizing it to do a title and mortgage guarantee business (R. 123). Since 1913 and during the year 1931, the Company carried on a mortgage guarantee business (R. 124).

The business of the Company in 1931 was selling and guaranteeing whole mortgages on New York real estate and participations in real estate mortgages (R. 29, 30), extending maturing mortgages and guarantees (R. 36, 37), and operating and selling foreclosed real estate acquired because of the Company's guarantees (R. 41, 42). The Company's procedures in the conduct of the business in 1931 were as follows:

Upon receipt of an application for a first mortgage loan on real estate, the Company would make an inspection and appraisal of the property, and, if the application was approved by the Company's loan committee, would have an examination made of the title to the real estate (R. 30). The Company would then lend the money and receive the bond and mortgage (R. 31).

The Company would at the same time make a charge to the borrower, covering the cost of the inspection and appraisal of the property, and in the case of building loans, additional inspections in the course of construction (R. 31, 32). The charge was usually 1% of the principal amount for an ordinary loan, and 3% for a building loan, and was called, on the books of the Company, a lending fee (R. 31, 32).

The Company would then sell the mortgage at its face amount and would insure to the purchaser the payment of principal and interest, for an annual charge of ½ of 1% of the principal amount, so that the purchaser of a mort-

gage bearing interest at the rate of 6% would receive an insured rate of 5½% (R. 32).

Sometimes a mortgage was too large to be assigned as a whole mortgage. In such case, the Company would issue guaranteed participation certificates in the mortgage, or in a group of mortgages (R. 33).

When a whole mortgage was sold to a single purchaser, the Company delivered to the purchaser its policy of mortgage guarantee, and when only a part of a mortgage was sold, the purchaser was given its guaranteed participation certificate (R. 33). Each policy or certificate guaranteed the payment of the principal amount thereof and of interest at an agreed rate, which was usually ½ of 1% less than the rate specified in the bond and mortgage (Exhibits E-G, R. 32). This interest differential of ½% retained by the Company was called in the policy the premium for its guarantee (Exhibit E).

Except in the case of building loans which would not be assigned until the building had been completed, the Company sold the mortgages or the participation certificates almost immediately after the loans were made (R. 74). The Company never made a profit on the sale of the mortgages or certificates; they were always sold at their face amount (R. 32).

When a mortgage was about to mature and the property owner desired an extension, the Company would make another inspection and appraisal, and upon renewal of the loan and of its guarantee, would charge the owner a fee to cover the expenses of inspection and appraisal (R. 39). This charge was never more than 1% and was called, on the books of the Company, an extension fee (R. 41).

In the event of default by the property owner, the Company would pay the guarantee holder the amount due him for principal and interest, would then foreclose the mortgage and take title to the real estate (R. 41, 42). Thereafter, the Company would operate and sell such real estate, and during the year 1931, it sustained losses of $421,771.97 on the sale of such foreclosed real estate (R. 90).

Ever since its incorporation in 1893, and during the year 1931, the Company was always subject to examination by and under the supervision of the Superintendent of Insurance of the State of New York, was always subject to the provisions of the New York insurance law applicable to title and credit guaranty corporations organized thereunder, was always subject to the regulations of the Superintendent of Insurance, and was always required to file and did file with the Superintendent of Insurance, the annual statements required by him on forms approved by him (R. 128).

The Company filed its income tax return for the calendar year 1931 with the Collector of Internal Revenue for the Third District of New York, and reported therein its gross income as follows (R. 127, 143):

Premiums	$2,051,721.67
Interest on mortgages	810,151.30
Interest on bank deposits	35,643.34
Rents	279,526.23
Profit on sale of U. S. bonds	35,499.99
Lending fees	779,302.18
Extension fees	275,498.84
Total	$4,267,343.55

Of the above total income of $4,267,343.55, the amount of $779,302.18 represents fees and charges for inspections, appraisals and other services in connection with the making of mortgage loans, and the amount of $275,498.84 represents fees and charges for such services in connection with the extending of mortgage loans.

In 1932, this Court decided the case of *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182, 52 S. Ct. 350, 76 L. Ed. 690, wherein it held that the Company was not taxable as an insurance company for the years 1922 and 1923 because its income from insurance for those years was less than one-third of its total income.

The amount of mortgages and mortgage certificates guaranteed by the Company outstanding at the end of the year 1922 was $149,433,293.00, and outstanding at the end of the year 1931 was $434,870,083.00 (R. 128).

The District Court held that the Company during the year 1931 was not an insurance company within the meaning of Section 204 of the Revenue Act of 1928, and directed judgment for the respondent (R. 168), 60 F. Supp. 37. Upon appeal to the Circuit Court of Appeals, the judgment was affirmed (R. 179), 153 F. (2d) 425.

Specifications of Errors to Be Urged

1) The Circuit Court of Appeals erred in holding that the "character" of the business done by the Company in 1931 is not determined by the proportionate amounts of income derived from insurance.

2) The Circuit Court of Appeals erred in holding that the Company was not an insurance company other than life or mutual for the year 1931.

Reasons for Granting the Writ

1) The issue involved in this case is important in the administration of the tax laws. Although the case arises under the provisions of the Revenue Act of 1928, which taxed insurance companies on income from specific sources only, the question whether mortgage guaranty companies are taxable as insurance companies or as ordinary business corporations is still important because under the Internal Revenue Code insurance companies are entitled to certain benefits in the computation of their income and excess-profits taxes.

2) The issue involved in this case depends on the proper interpretation of the decision of this Court in the case of

Bowers v. *Lawyers Mortgage Co.*, 285 U. S. 182, where the Court said, at page 188, that "the character of the business actually done in the tax years determines whether it was taxable as an insurance company." The Court did not define the term "the character of the business" but indicated how it should be determined. The decision of the Circuit Court of Appeals appears to be in conflict with the determination of this Court. The decision is also directly at variance with the determination of the Circuit Court of Appeals for the Third Circuit in the case of *National Commercial Title & Mortgage Guaranty Co.* v. *Duffy, et al.*, 132 F. (2d) 86.

3) The petitioner believes that the Circuit Court of Appeals failed to apply to the instant case the decision of this Court in *United States* v. *Home Title Insurance Co.*, 285 U. S. 191, 52 S. Ct. 319, 76 L. Ed. 695, decided with the *Bowers* case, supra, and that the decision of the Circuit Court of Appeals is probably in conflict with that decision of this Court. This Court found that Home Title Insurance Co. was an insurance company subject to tax as such because its income from insurance and other sources incident to insurance was the major portion of its income, while, the Circuit Court of Appeals in the instant case held that the proportion of income received from insurance activity had nothing to do with the question whether a company was subject to tax as an insurance company.

4) The Circuit Court of Appeals conceded that the petitioner found support for his contention that the Company was an insurance company in 1931, in Section 29.3797-7 of Treasury Regulations 111 but held in effect that such regulation was contrary to the decision of the *Bowers* case, supra. This Treasury regulation has been in effect since 1937 and should have been given weight in determining what "character of the business actually done" means. *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 53 S. Ct.

337, 77 L. Ed. 739; *Brewster* v. *Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 59 S. Ct. 423, 83 L. Ed. 536.

For these reasons, it is respectfully submitted that the petition should be granted.

SAMUEL MARKOWITZ,
Counsel for Petitioner.

April, 1946.

BRIEF IN SUPPORT OF THE PETITION

Opinions Below

The opinion of the District Court appears on pages 154-168 of the record and is reported in 60 F. Supp. 37. The opinion of the Circuit Court of Appeals appears at pages 177-179 of the record and is reported in 153 F. (2d) 425.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered February 6, 1946 (R. 180). Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229 (43 Stat. 938).

Question Presented, Statutes Involved, etc.

A statement of the question presented, specifications of errors to be urged, and a statement of the case will be found in the petition. The statute involved is set forth in the Appendix, pp. 15-17, infra.

Argument

Section 204 of the Revenue Act of 1928 imposed an income tax on insurance companies other than life or mutual. The statute did not define the term "insurance companies other than life or mutual". However, in *Bowers* v. *Lawyers Mortgage Company*, 285 U. S. 182, supra, this Court adopted a test for determining what is an insurance company other than life or mutual, within the meaning of the Revenue Act. The Court said, at page 188:

> "While name, charter powers and subjection to state insurance laws have significance as to the busi-

> ness which a corporation is authorized and intends to carry on, the character of the business actually done in the tax years determines whether it was taxable as an insurance company."

Though the Court stated that the character of the business actually done determines whether a company is taxable as an insurance company, it did not specifically define the meaning of the term "character", or what elements determine the character of the business done. It found, however, that the premiums from guarantee for the years 1922 and 1923 amounted to about one-third of the company's total income, and concluded that "the element of guaranty involved in its transactions in the tax years was not sufficient to make it an insurance company."

On the same day the *Bowers* case was decided, this Court also decided the case of *United States* v. *Home Title Insurance Co.*, 285 U. S. 191, supra. In that case the Court found that Home Title Insurance Co. was taxable as an insurance company because its combined income from premiums for title insurance and mortgage guaranty and from charges for services incident to such insurance was the greater source of its income. This Court said, at page 195:

> "The amounts received as compensation for insuring titles, for guaranteeing that mortgages are first liens, and for guaranteeing payment, constitute the larger part of respondent's income. And, when there are added the fees and charges for examination of title, appraisals, and other services incident to its insurance business, the total properly assignable to that business amounts to more than 75 per cent of all respondent's income. Undeniably insurance is its principal business".

From these two decisions, it appears, therefore, that when this Court stated that whether a company was an insurance company or not was determined by the character of the business it did in the tax year, the Court had reference to the activities of the company producing its income—if

insurance was the principal source of its income, it was an insurance company and taxable as such.

The Circuit Court of Appeals in the case at bar reached the opposite conclusion. It stated (R. 178, 179), 153 F. (2d) 426:

> "* * *However, the test which determines the taxability of the corporation on the various items of income it received is not whether the term 'insurance company' aptly described the corporation itself because of the proportionate amount of its gross or net income received from activity properly classified as insurance. Instead, as shown by the Bowers case, *supra,* it is the character of the business it did to produce the particular income taxed. 8 Mertens, Law of Federal Income Taxation (1942) §§ 44.04, 44.05."

It thus appears that there is a conflict between the decisions of this Court in the *Bowers* and *Home Title* cases, supra, and the decision of the Circuit Court of Appeals in the instant case. This conclusion of the Circuit Court of Appeals is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *National Commercial Title & Mortgage Guaranty Co.* v. *Duffy, et al.,* 132 F. (2d) 86. In approving the proportionate method of determining insurance company classification, the Court said:

> "The trial judge was therefore warranted in finding that the greater portion of the taxpayer's income was derived from non-insurance sources and in concluding that the plaintiff was not taxable as an insurance company during the years in controversy."

In applying the proportionate method of determining insurance company classification to the instant case, it will be found that there has been a substantial change in the character of the business transacted by the Company in the year 1931, as compared with the years 1922 and 1923. In 1922, the Company's income from premiums was $619,986.38 and in 1923, it was $750,803.21, about one-third of its total income in each of those years (285 U. S. 188, 190). By 1931,

its insurance business had grown so large that its premium income for that year was $2,051,721.67 (R. 143), almost three times as much as for 1922 and 1923. *This amount of $2,051,721.67 represented over 48% of its total income for 1931, of $4,267,343.55, constituting, by itself, the biggest source of income for that year.*

If, as this Court found, Home Title Insurance Co. was an insurance company because "insurance is its principal business" (285 U. S. 191, 195), then, by analogy, this Company was also an insurance company in 1931. The testimony in the instant case (R. 30-32) clearly discloses that the Company's practice in 1931 in the guaranteeing of first mortgage loans was to perform, and make almost the same charges for, the services shown in the *Home Title* case to have been rendered by that company in the conduct of its mortgage guarantee business. Thus, when, as in the *Home Title* case, there is added to the Company's premium income of $2,051,721.67 for 1931, its income of $1,054,801.02 from charges for inspections, appraisals and related services, which services this Court held in that case to be "incident to its insurance business", the total of the Company's income assignable to its insurance business in 1931 amounts to $3,106,522.69, or more than 72% of its total income for that year.

It is therefore apparent that the Company's principal business in 1931 was insurance and that it was subject to tax for that year as an insurance company under Section 204 of the Revenue Act of 1928.

Furthermore, the decision of the Circuit Court of Appeals is in conflict with the Treasury Regulations, Section 29.3797-7 of Regulations 111. That section, defining the term "insurance company" states as follows:

> "Though its name, charter powers, and subjection to State Insurance laws are significant in determining the business which a corporation is authorized and intends to carry on, the character of the business actually done in the taxable year determines whether it is taxable as an insurance company under the Internal Revenue Code. For example, dur-

> ing the year 1942 the M Corporation, incorporated under the insurance laws of the State of R, carried on the business of lending money in addition to guaranteeing the payment of principal and interest of mortgage loans. Of its total income for the year one-third was derived from its insurance business of guaranteeing the payment of principal and interest of mortgage loans and two-thirds was derived from its noninsurance business of lending money. The M Corporation is not an insurance company for the year 1942 within the meaning of the Code and these regulations".

The Treasury Department thus interprets this Court's decisions to mean that the term "the character of the business actually done in the taxable year" has reference to the activities of the company producing its income, and it is an insurance company if insurance is the principal source of its income. The Circuit Court of Appeals refers to this ruling in its opinion (R. 178) but in spite of that, holds that the proportion of income received by the Company from its insurance business in 1931 has no bearing upon the question whether it is an insurance company or not.

The above Treasury regulation is the same as Section 19.3797-7 of Reg. 103 (1940); Article 901-7 of Reg. 101 (1938); Art. 1001-7 of Reg. 94 (1936), as amended by T. D. 4759, 1937-2 C. B. 117. This regulation having been in effect without change for a number of years despite subsequent reenactment of Section 204 of the Code, it should have been given consideration by the Circuit Court of Appeals. In *Massachusetts Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, supra, this Court said, at page 273:

> "The Congress in the Revenue Acts of 1928 and 1932 reenacted Section 245 without alteration. This action was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous, it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute (citing cases)."

See also, *Brewster* v. *Gage*, 280 U. S. 327, supra; *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, supra.

Similarly, since Congress did not define the term "insurance companies other than life or mutual", and this Court ruled that whether a company is taxable as an insurance company is determined by the character of the business actually done in the tax years, and the Treasury Department has interpreted the word "character" to mean the proportion that a company's income from insurance is to its total income from all sources, it is reasonable to assume that if this was contrary to the intent of Congress, the tax laws would have been revised to define an "insurance company" in such terms as to make the definition clear and unambiguous.

Conclusion

It is respectfully submitted that the decision of the Circuit Court of Appeals is erroneous. The question presented is of importance in the administration of the tax laws. The conclusion reached by the District Court and the Circuit Court of Appeals is apparently contrary to that reached by this Court in the *Bowers* case and the *Home Title* case. It is also in conflict with the decision of the Third Circuit in the *National Commercial Title* case, and is contrary to the regulations of the Treasury Department.

It is therefore respectfully submitted that the petition should be granted.

SAMUEL MARKOWITZ,
Counsel for Petitioner.

THOMAS D. AUSTIN,
ALFRED C. BENNETT,
Of Counsel.

April, 1946

Appendix

Revenue Act of 1928, c. 852, 45 Stat. 791:

SECTION 204. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL.

(a) Imposition of tax.—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company, 12 per centum of its net income;

(2) In the case of such a foreign insurance company, 12 per centum of its net income from sources within the United States.

(b) Definition of income, etc.—In the case of an insurance company subject to the tax imposed by this section—

(1) Gross Income.—"Gross income" means the sum of (A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners, and (B) gain during the taxable year from the sale or other disposition of property;

(2) Net Income.—"Net income" means the gross income as defined in paragraph (1) of this subsection less the deductions allowed by subsection (c) of this section.

(3) Investment Income.—"Investment income" means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows:

To all interest, dividends, and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable

year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) Underwriting Income.—"Underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

(5) Premiums Earned.—"Premiums earned on insurance contracts during the taxable year" means an amount computed as follows:

From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

(6) Losses Incurred.—"Losses incurred" means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

(7) Expenses Incurred.—"Expenses incurred" means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses

incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by subsection (c) of this section.

(c) Deductions allowed.—In computing the net income of an insurance company subject to the tax imposed by this section there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in section 23 (a);

(2) All interest as provided in section 23 (b);

(3) Taxes as provided in section 23 (c);

(4) Losses incurred as defined in subsection (b) (6) of this section;

(5) Losses sustained during the taxable year from the sale or other disposition of property;

(6) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;

(7) The amount received as dividends from corporations as provided in section 23 (p);

(8) The amount of interest earned during the taxable year which under section 22 (b) (4) is exempt from taxation under this title, and the amount of interest allowed as a credit under section 26;

(9) A reasonable allowance for exhaustion, wear and tear of property, as provided in section 23 (k);

(10) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $3,000; but if the net income is more than $25,000 the tax imposed by this section shall not exceed the tax which would be payable if the $3,000 credit were allowed, plus the amount of the net income in excess of $25,000.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1182

ROBERT E. DINEEN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF LAWYERS MORTGAGE COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 177–179) is reported at 153 F. 2d 425. The findings of fact and opinion of the District Court (R. 154–168) is reported at 60 F. Supp. 37.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 6, 1946. (R. 179–180.) The petition for a writ of certiorari was filed May 1, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Lawyers Mortgage Company, a corporation organized under the laws of the State of New York, was an "insurance company" other than "life or mutual" within the meaning of Section 204 of the Revenue Act of 1928, and as such taxable under that section on its income for the taxable year 1931.

STATUTE INVOLVED

The material provisions of the statute involved are printed in the Appendix, *infra*, pp. 12–15.

STATEMENT

This is a suit against the United States by the Superintendent of Insurance of the State of New York, as Liquidator of Lawyers Mortgage Company, a New York corporation, for refund of $126,576.12, plus interest thereon, paid by that company as federal income tax for the taxable year 1931. The basis of the suit is that Lawyers Mortgage Company was an insurance company, other than life or mutual, during that year, within the meaning of Section 204 of the Revenue Act of 1928, and that its income for 1931 was therefore taxable under the latter section rather than under the provisions of the Act applicable to corporations generally. (R. 2–14.)[1]

[1] Lawyers Mortgage Company previously had brought a similar suit for refund of capital stock taxes paid under the Revenue Act of 1921, c. 136, 42 Stat. 227, for the fiscal years ended June 30, 1922, and 1923, and this Court held that the

Most of the material facts were stipulated in the District Court. (R. 121–130.) On the basis of the stipulated facts, plus certain oral and documentary evidence introduced by the parties (R. 26–78, 83–117, 131–153), the District Court made findings of fact and conclusions of law (R. 159–168), and entered judgment for the Government (R. 169–170) which was affirmed on appeal (R. 177–180).

The facts found by the District Court (R. 159–167) are not in dispute. At all times material to this action Lawyers Mortgage Company was a domestic corporation organized and existing under the insurance laws of New York with its office and principal place of business in New York City. (R. 159–160, 163.)[2] On or about March 14, 1932, it filed a corporation income tax return for the taxable year 1931 on which it reported a gross income of $3,865,414.66, deductions of $1,593,579.71, taxable net income of $2,271,834.95, and a total tax due of $272,620.19 which was paid in installments during the year 1932. (R. 163.)

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company was not an insurance company other than life or mutual within the meaning of that Act for the years there involved. See *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182.

[2] In *Bowers* v. *Lawyers Mortgage Co.*, *supra*, this Court pointed out that although organized under the New York insurance laws the company confined itself in the years there involved mostly to business which also could have been carried on under the banking laws of that state. The record shows there was no change in that respect during the taxable year here involved. (R. 66, 158.)

Since the date of its incorporation in 1893, and including the taxable year 1931, Lawyers Mortgage Company always has been and is subject to regulation and examination by, and subject to supervision of the Superintendent of Insurance of the State of New York, has always been and is subject to the insurance laws of the State of New York applicable to title and credit guaranty companies organized thereunder, and, until the entry of an order by the Supreme Court of New York for rehabilitation of the company pursuant to state law, it was required to file with the Superintendent of Insurance, on forms approved by him, the statements required by him for each year. (R. 164.) The order of rehabilitation was entered on or about August 2, 1933, and thereupon the then Superintendent of Insurance took possession of the property and business of the company, as Rehabilitator, and proceeded to rehabilitate its affairs and deal with its property in its name. (R. 161.) The present action is being maintained by a successor in office of the Superintendent of Insurance who took over the business and property of the company in 1933. (R. 162–163.)

On September 13, 1934, Lawyers Mortgage Company, by the then Superintendent of Insurance of New York, filed a claim for refund of $136,310.10 (of which $126,576.12 is here involved) of the federal income taxes paid by the company for the year 1931. (R. 131–142, 164.) The principal ground on which that claim was

based (R. 141–142), and the only ground now urged in this action, is that in the year 1931, the company was an "insurance company" other than "life or mutual" within the meaning of Section 204 of the Revenue Act of 1928, and that therefore extension and lending fees aggregating $1,054,801.02 which it had reported as income for 1931 should be eliminated in determining its tax liability for that year. In connection with this issue the District Court found that the business carried on by Lawyers Mortgage Company during the year 1931 was substantially as follows (R. 165–167):

> Upon receiving an application for a loan it caused an appraisal of the proposed real estate security to be made and procured a title insurance company to certify the property, make a report as to title and insure the same. The person borrowing money from the company, having executed and delivered a bond and mortgage to the company, received from it an amount specified therein, less charges for title insurance, survey, disbursements and recording taxes.
>
> There was also subtracted from the amount given to the borrower by the company, a lending fee, some portion of which appears to have represented an appraisal charge. The appraisals were carried on by employees of the company, who worked on a salary basis.
>
> The loan would be sold either in its entirety or in parts. When the loan was sold

as a whole, Lawyers Mortgage Company delivered to the purchaser a contract called a "policy of mortgage guarantee." When a part of the loan was sold, a participation certificate was given to the purchaser indicative of the amount which he had paid therefor and purporting to represent his interest in the whole mortgage.

The "policies" and the certificates by their terms required the holders thereof by accepting the same from the company, to assign to the company all the rights in which they might share as mortgagees or assignees of the mortgages. Each "policy" or certificate contained a so-called guarantee by which Lawyers Mortgage Company guaranteed the payment of the principal amount thereof, as and when collected, but in any event within eighteen months following written demand made after maturity of the "policy" or certificate. Almost invariably the maturity date of the "policy" or certificate coincided with the maturity date of the mortgage loan with which it was connected.

The company further guaranteed the payment of interest to the purchaser of the "policy" or certificate at regular periods and at an agreed rate. This rate was usually ½ of 1% less than that specified in the bond and mortgage, but in some instances at least, the rate paid to the person purchasing from Lawyers Mortgage Company was identical with the rate received by Lawyers Mortgage Company from the

original borrower. Where the differential of ½ of 1% existed between the interest rate paid by the borrower and the interest rate paid by Lawyers Mortgage Company to the purchasers of "policies" and certificates, the company retained the difference and called it "premium." The company also retained the interest accruing between the making of loans on mortgage security and the sale of the "policies" and certificates. It also charged extension fees to the borrowers for the renewal of loans at the maturity dates of the bonds and mortgages.

The company made no assignment or apportionment of assets or income to the different parts of its business, but used them indiscriminately in its different activities. No part or portion of the expense of its various activities (e. g.) appraisement, bookkeeping, sales of certificates, preparation of documents, etc., was charged against any specific source of income.

The company at all times throughout the year 1931 owned first mortgages which were available for its guaranty fund pursuant to the then effective Section 173 of the Insurance Law of the State of New York, (Chapter 290, Laws of 1929). No specific mortgages were ever earmarked or segregated as being applicable to the guaranty fund. The statute in question did not require any segregation. No portion of the so-called "premium" described above was ever allocated under insurance risk.

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On the basis of this finding and testimony of one of the taxpayer's witnesses (R. 72), the District Court concluded (R. 167) that the character of the business carried on by the company in 1931 did not differ from the character of the business carried on by it in 1922 and 1923 and denied the claim for refund on authority of this Court's decision in *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182. (R. 154–159.) Its decision was affirmed by the Circuit Court of Appeals. (R. 177–179.)

ARGUMENT

There is no sufficient basis for granting certiorari in this case. As this Court pointed out in *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 182, a company claiming the benefit of the insurance provisions of the income tax laws has the burden of showing clearly that it is an insurance company within the meaning of the applicable provision of law. This the taxpayer has failed to do, just as it failed to do so for the years 1922 and 1923.

1. There is no reason to grant certiorari in this case, as contended by the petitioner (Pet. 6), to determine whether mortgage guaranty companies are taxable as insurance companies or as ordinary business corportions. Each case depends on its own facts and the question was sufficiently settled for present purposes by this Court's decision in *Bowers* v. *Lawyers Mortgage Co., supra,* where it was pointed out (p. 188) that "the character of the business actually done in the tax years de-

termines whether it was taxable as an insurance company."

2. There is no merit to the petitioner's contention (Pet. 6–7) that the decision below is in conflict with the decision of this Court in *Bowers* v. *Lawyers Mortgage Co., supra,* or that the court below erred in failing to apply this Court's decision in *United States* v. *Home Title Co.,* 285 U. S. 191. The substance of petitioner's argument (Br. 9–12) seems to be that classification as an "insurance company" depends upon the ratio of so-called insurance income to total income. *National Commercial Title & Mtg. Guar. Co.* v. *Duffy,* 132 F. 2d 86 (C. C. A. 3d). But analysis of those cases justifies the conclusion that the character of the business which produced the particular income taxed is the determining factor, and the court below so held. The "character" of the business of the two companies was essentially different. The business of the Home Title Insurance Company was primarily the insuring of titles and guarantying mortgages. The business of Lawyers Mortgage was—and still is—primarily a lending business. It did not insure titles, and its guarantying of mortgages, although a lucrative source of income for the year involved, was only incidental to its loan business. Moreover, it has not been shown that the critical item of "premiums" represented insurance.

For the year here involved the taxpayer reported so-called "premiums" of $2,051,721.67,

which petitioner considers as representing approximately 48% of the taxpayer's income for the year. (Br. 12.) But, as this Court observed with respect to the taxpayer's "premium" income for 1922 and 1923 (*Bowers* v. *Lawyers Mortgage Co.*, *supra*, p. 189):

> The so-called premiums amount to about one-third of total income, but they cover agency and other services which generally are not performed under contracts of insurance. There is no showing that these amounts do not include profits arising from such sales or that they are justly chargeable or were intended to apply only to the risks covered.

Here the petitioner did not and could not establish that the so-called premium income was entirely allocable to insurance risks. (R. 58.) Compare *Lincoln Mortgage & T. Guar. Co.* v. *Commissioner*, 79 F. 2d 585 (C. C. A. 3d), certiorari denied, 296 U. S. 654. Furthermore, it is to be noted that the taxpayer's business included selling parts of a mortgage loan, represented by participating certificates, as well as whole loans (R. 166), and it is doubtful if such transactions involved any insurance risk whatever. Compare *Lawyers Westchester Mortgage & Title Co.*, 247 App. Div. (N. Y.) 895, affirmed without opinion, 272 N. Y. 553; *Matter of People* (*Tit. & Mtge. Guar. Co.*), 264 N. Y. 69, 88; *Title G. & T. Co.* v. *Mortgage Comm.*, 273 N. Y. 415.

3. The decision below is in harmony with Section 29.3797–7 of Treasury Regulations 111, promulgated under the Internal Revenue Code, and it is only by inference that petitioner seeks to show it is authority for holding that Lawyers Mortgage Company should be taxed as an "insurance company" for the year involved.

CONCLUSION

The decision of the court below is correct, and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1946.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 204. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL.

(a) *Imposition of tax.*—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company, 12 per centum of its net income;

(2) In the case of such a foreign insurance company, 12 per centum of its net income from sources within the United States.

(b) *Definition of income, etc.*—In the case of an insurance company subject to the tax imposed by this section—

(1) *Gross Income.*—"Gross income" means the sum of (A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners, and (B) gain during the taxable year from the sale or other disposition of property;

(2) *Net Income.*—"Net income" means the gross income as defined in paragraph (1) of this subsection less the deductions

allowed by subsection (c) of this section.

(3) *Investment Income.*—"Investment income" means the gross amount of income earned during the taxable year from interest, dividends, and rents, computed as follows:

To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) *Underwriting Income.*—"Underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

(5) *Premiums Earned.*—"Premiums earned on insurance contracts during the taxable year" means an amount computed as follows:

From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

(6) *Losses Incurred.*—"Losses incurred" means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so ob-

tained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

(7) *Expenses Incurred.*—"Expenses incurred" means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by subsection (c) of this section.

(c) *Deductions Allowed.*—In computing the net income of an insurance company subject to the tax imposed by this section there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in section 23 (a);

(2) All interest as provided in section 23 (b);

(3) Taxes as provided in section 23 (c);

(4) Losses incurred as defined in subsection (b) (6) of this section;

(5) Losses sustained during the taxable year from the sale or other disposition of property;

(6) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;

(7) The amount received as dividends from corporations as provided in section 23 (p);

(8) The amount of interest earned during the taxable year which under section 22 (b) (4) is exempt from taxation under this title, and the amount of interest allowed as a credit under section 26;

(9) A reasonable allowance for the exhaustion, wear and tear of property, as provided in section 23 (k);

(10) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $3,000; but if the net income is more than $25,000 the tax imposed by this section shall not exceed the tax which would be payable if the $3,000 credit were allowed, plus the amount of the net income in excess of $25,000.

(d) *Deductions of foreign corporations.*—In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in Supplement I.

(e) *Double deductions.*—Nothing in this section shall be construed to permit the same item to be twice deducted.

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